Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services	CC Docket No. 96-21, FCC 96-59

COMMENTS OF SBC COMMUNICATIONS INC.

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SUMMARY

SBC is opposed to the Commission's tentative conclusions, including the requirement that BOCs form separate affiliates in order to obtain non-dominant regulation of their out-of-region, interstate, interexchange services. The Commission's tentative conclusions are in opposition to the Telecommunications Act of 1996's deregulatory purpose in that the Commission has proposed to regulate the BOCs' out-of-region services as dominant unless provided by a separate affiliate. These conclusions are not only unsupported by the language of the Telecommunications Act, but they fail to promote any important policy objective. Existing regulatory safeguards are sufficient to meet the Commission's stated objectives. Further, the Commission's tentative conclusions fail to meet the Commission's existing rules, including the existing definition of "dominant" and "non-dominant." Because of the magnitude of the differences between dominant and non-dominant regulation, the Commission's adoption of its tentative conclusions would serve to impede the introduction of competition to the interexchange business. The Commission should follow the lead of the Telecommunications Act and decline to regulate BOCs as dominant in the provision of out-of-region, interstate, interexchange service.

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SBC Communications Inc. ("SBC"), by its attorneys and in behalf of its subsidiary, Southwestern Bell Communications Services, Inc. ("SBCS"), files these comments in response to the Notice of Proposed Rulemaking issued by the Commission on February 14, 1996 ("NPRM").

I. INTRODUCTION

Although SBC disagrees fundamentally with the tentative conclusions reached in the NPRM, it commends the Commission for examining on an extremely expedited schedule the question of the form of regulation required for Bell Operating Company ("BOC") provision of interstate, interexchange services originating outside of their respective in-region states. The Commission's schedule can result in an order within weeks, removing a potential obstacle to the BOCs entering the market as Congress intended: immediately upon enactment of the Telecommunications Act of 1996 (the "Telecommunications Act").

The NPRM's principal tentative conclusion is that BOC out-of-region originating interstate, interexchange services, including services provided to commercial mobile radio services ("CMRS") customers, should be permitted non-dominant treatment only through a structurally separate affiliate. The NPRM also tentatively concludes that to be treated as non-dominant, a

BOC must form an affiliate that (1) maintains separate books of account from the BOC; (2) does not jointly own transmission or switching facilities with the BOC local exchange company; and (3) obtains "any BOC exchange telephone services at tariffed rates and conditions."[1] SBC submits that to be authorized as intended by the Telecommunications Act, BOC out-of-region interexchange activities must be regulated as non-dominant without the necessity of the structural separation mechanisms.

II. DISCUSSION

A. DOMINANT REGULATION IS ONEROUS ENOUGH THAT THE COMMISSION'S PROPOSED RULES EFFECTIVELY REQUIRE THAT THE BOCS ESTABLISH SEPARATE AFFILIATES

The differences between dominant and non-dominant regulation are not trivial. The regulation the Commission requires of "dominant" interstate, interexchange carriers is comparatively onerous; the Commission's regulation of non-dominant carriers, on the other hand, is relatively streamlined.[2] As summarized in the AT&T Order, non-dominant carriers have numerous regulatory advantages over dominant carriers:

(1) Non-dominant carriers are not subject to any regulatory pricing constraints, such as price cap regulation.[3]

(2) Non-dominant carriers are allowed to file tariffs for all of their domestic

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[1]NPRM at ¶ 13 (citing In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket 79-252, 98 F.C.C. 2d 1191 (1984)(the "Fifth Report and Order")).

[2]See In the Matter of Motion of AT&T Corp. to Be Re-Classified as a Non-Dominant Carrier, Order, FCC 95-427 (October 23, 1995) at ¶¶12-13 ("AT&T Order").

[3]See 47 C.F.R. § 61.41-61.42.

services on one day's notice, and the tariffs are presumed lawful.[4]

(3) Non-dominant carriers are not required to report or to file carrier-to-carrier contracts.[5]

(4) Non-dominant carriers are not subject to several Section 214 requirements, including (a) non-dominant carriers are automatically authorized to extend services to any domestic point, and to construct, acquire, or operate any transmission lines, as long as they obtain Commission approval for the use of radio frequencies;[6] and (b) non-dominant carriers are only required to report additional circuits to the Commission on a semi-annual basis.[7] In addition, non-dominant carrier requests to discontinue or reduce service will be deemed granted after 31 days unless a party or the Commission objects.[8]

(5) Non-dominant carriers, not being subject to price cap regulation, do not have to submit cost-support data now required for many dominant carriers' filings, such as tariff filings for new services.[9]

(6) Non-dominant carriers are not subject to some annual reporting requirements, including ARMIS-like reports, an annual financial report, a depreciation rate report, an annual rate-of-return report, and a report of

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[4]Tariff Filing Requirements for Nondominant Carriers, CC Docket No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752 (1993) (Tariff Filing Requirements Order), vacated Southwestern Bell Corp. v. FCC, 43 F. 3d 1515 (D.C. Cir. 1995); Order on Remand, FCC 95-399, at paras. 8-9 (rel. September 27, 1995)(Tariff Filing Requirements Remand Order); First Report and Order, 85 FCC 2d 1, 31-33 (1980).

[5]See 47 C.F.R.§43.51.

[6]47 C.F.R. §63.07(a).

[7]Id. at §63.07(b). These requirements were also modified as to all carriers by Telecommunications Act Section 11.

[8]Specifically, non-dominant carriers are (a) required to notify all affected customers in writing of the planned discontinuance, reduction or impairment unless the Commission authorizes another form of notice in advance; (b) required to file with the Commission an application indicating the change in service, on or after the date on which the notice has been given to all affected customers. The application will be automatically granted on the 31st day after the non-dominant carrier files its application with the Commission, unless the Commission has otherwise notified the carrier. See 47 C.F.R. § 63.71.

[9]See id. at §§61.38, 61.49.

access minutes.[10]

The advantages of being a non-dominant carrier, particularly the advantage of filing tariffs on one day's notice, are extremely important in a competitive market. A provider's ability to change prices without tipping its hand to competitors is essential. In order for any new entrant to the interexchange services business to compete effectively, it must be permitted to operate under the Commission's non-dominant carrier rules. The NPRM's tentative conclusions, therefore, effectively require that a BOC establish a separate affiliate to provide out-of-region originating, interstate, interexchange services.

B. THE NRPM'S TENTATIVE CONCLUSIONS FRUSTRATE THE INTENT OF THE TELECOMMUNICATIONS ACT

"Dominant" and "non-dominant" interexchange carrier regulation is not addressed in the Telecommunications Act. The Commission should not use the dominant/non-dominant regulatory dichotomy to require effectively what the Telecommunications Act does not. Section 271 provides, in pertinent part,

> SEC. 271. BELL OPERATING COMPANY ENTRY INTO INTERLATA SERVICES
>
> (a) GENERAL LIMITATION.--Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.
>
> (b) INTERLATA SERVICES TO WHICH THIS SECTION APPLIES.--
>
> (2) OUT-OF-REGION SERVICES.--A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after the date of enactment of the Telecommunications Act of 1996, subject to subsection (j).[11]

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[10]See id. at §§43.21, 43.22, 43.43.

[11]Id. at Section 271 (b)(2)(emphasis added).

Section 272 also provides in pertinent part:

> (a) (2) SERVICES FOR WHICH A SEPARATE AFFILIATE IS REQUIRED.-- The services for which a separate affiliate is required by paragraph (1) are:
>
> (B) Origination of interLATA telecommunications services, other than--
>
> (ii) out-of-region services described in section 271 (b)(2).[12]

The Joint Explanatory Statement of the Committee of Conference also states that "[n]ew section 271(b)(2) permits a BOC to offer out-of-region services immediately after the date of enactment."[13]

> As Senator Pressler stated in his letter to the Commission of February 21, 1996,
>
> [N]ew 47 U.S.C. Section 271 (b) provides that a Bell company "may provide interLATA services originating outside its in-region states after the date of enactment... ." New section 272 (a)(2)(B)(ii) explicitly provides that the newly enacted separate affiliate requirements do not apply to out-of-region services. Nevertheless, the FCC on February 14, 1996, proposed that out-of-region services would be sanctioned only upon the establishment of a separate subsidiary by Bell companies.

While Senator Pressler's letter fails somewhat to appreciate the underlying basis of the NPRM--the Commission's tentative conclusions would not require a separate affiliate to be established, but only require a separate affiliate for non-dominant regulation--it is important that the Commission keep in mind that at the time the Telecommunications Act was enacted, no IXC was subject to the Commission's regulation for dominant carriers. At the time of enactment, even AT&T, with all of its advantages in the interexchange market, had been declared non-dominant.[14] The only suggestion in existence at the time of enactment that BOCs might be subject to the

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[12]Id. at Section 272 (a)(2)(B)(ii)(emphasis added).

[13]Joint Explanatory Statement of the Committee of Conference at 147.

[14]See AT&T Order.

dormant doctrine of dominant regulation as set forth in the NPRM was a decade-old footnote in the Fifth Report and Order.[15] It was not foreseeable to Congress that the Commission would adopt dominant regulation for out-of-region, non-separate-affiliate BOC services specifically authorized to be undertaken without a separate affiliate. The Commission should not adopt rules that are inconsistent with either the letter or the spirit of the Telecommunications Act.

To the extent that the Commission's proposed dominant carrier regulations delay or impede a BOC's provision of out-of-region services beyond the date of enactment, they impinge upon Congressional intent that BOCs--and not just their subsidiaries or affiliates--may offer such services immediately upon enactment.[16] The Commission should not, therefore, propose to regulate BOCs as dominant in their out-of-region provision of interstate, interexchange services.

C. THE FIFTH REPORT AND ORDER'S RULES ARE NOT PRECEDENT FOR BOC ENTRY AND NEED NOT BE EXTENDED TO THEM

If the Telecommunications Act was not clear enough, the Commission must acknowledge that the policy underlying the Fifth Report and Order is inapplicable to BOC out-of-region services, both in the context of the Commission's existing rules and from a historical standpoint. The separate affiliate rules of the Fifth Report and Order were contemplated to cover companies, such as Sprint-United, that provided interexchange services in the same geographic areas in which they controlled exchange access facilities. The Commission's intent is made clear, in part, by the third part of the Fifth Report and Order's separation requirements, that an

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[15] See also Fifth Report and Order, 98 F.C.C. 2d 1191 at fn 23.

[16] For instance, given the 45-day tariff filing requirement for dominant carriers (47 C.F.R. §61.58), it is impossible for a BOC subject to dominant carrier regulation to offer interexchange services "immediately."

interexchange carrier purchase its affiliated exchange telephone company's services through tariffs only.[17]

Although the Commission broadly states that its tentative conclusions are reached because some of the traffic originated by BOCs out-of-region will terminate in-region,[18] no exchange telephone company has the ability to discriminate in favor of its affiliate.[19] The NPRM fails to explain--as a practical or policy matter--why existing non-discrimination and anti-cross-subsidization safeguards are insufficient to keep BOCs from gaining an unfair competitive advantage.

In addition, the Fifth Report and Order was adopted at a time that BOCs could not provide interLATA interexchange services--whether in or out of region--without a waiver of the MFJ. The BOCs, therefore, were not as a practical matter anything more than hypothetical participants in the market, and their in-region market power in the context of interstate interexchange services was not worthy of any more Commission consideration than was contained

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[17]Fifth Report and Order, 98 FCC 2d 1191, at ¶ 9. In what may be nothing more than a semantic inconsistency, the NPRM goes further than the strictures set forth in the Fifth Report and Order. In the Fifth Report and Order, independent (non-BOC) "exchange telephone companies" that sought to qualify for non-dominant treatment in the provision of all interstate interexchange services were required to establish a structurally separate affiliate. Under the Fifth Report and Order, the affiliate "must have separate books of account, and must not jointly own transmission or switching facilities with that exchange telephone company. If the affiliate uses the exchange telephone company's services, it should acquire them by the exchange telephone company's tariffs." Id. at ¶9. Under the Fifth Report and Order, therefore, the separate affiliate of an independent exchange telephone company must obtain its affiliated--that is, by analogy, "in-region"-- exchange telephone company's services by means of tariff. The Fifth Report and Order does not require that the long distance company purchase "any" exchange telephone company's services by tariff, particularly those of an unaffiliated carrier.

[18]NPRM at ¶ 12-13.

[19]See, e.g., 47 U.S.C. §§201,202; 47 C.F.R. §§32.1, et seq.; 47 C.F.R. §§64.901, et seq.

in a footnote.[20] Reliance upon the footnoted dictum as a reason to impose structural separation requirements upon BOCs, particularly when the existing regulatory safeguards are sufficient, is untenable.

D. THE COMMISSION SHOULD NOT REGULATE BOCS AS DOMINANT WHEN IT ACKNOWLEDGES THAT THE FACTS SUGGEST OTHERWISE

The Commission acknowledges that "[the available] facts suggest that, upon entry into the provision of out-of-region interstate, interexchange services, BOC affiliates would not be likely to possess market power."[21] Nevertheless, the NPRM proposes to treat BOCs as "dominant" unless its out-of-region interexchange services are provided through a structurally separate affiliate.[22] This conclusion is inconsistent with the Commission's rules.

A "dominant carrier" is defined in the Commission's rules as a carrier that possesses "market power (i.e., power to control prices)," and a "non-dominant carrier" is defined as "[a] carrier not found to be dominant [i.e., one that does not possess market power]."[23] The

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[20] See Fifth Report and Order, 98 F.C.C. 2d 1191 at fn 23.

[21] NPRM at ¶8.

[22] Id at ¶13. This procedure is based upon footnote 23 of the Fifth Report and Order, which was restated in the recent order of the Commission granting AT&T non-dominant status in the domestic interexchange market. Aside from the fact that this footnote is merely dictum and is not a formal Commission rule or policy, SBC submits that it does not mean that a BOC is automatically a dominant carrier in the interexchange market, especially in light of the AT&T Order. Rather, the footnote addressed only the issue of the degree of structural separation, "if any," that might be required if a BOC provided interexchange services. See Fifth Report and Order.

[23] AT&T Order at 15 (citing 47 C.F.R. §§ 61.3(o), 61.3(t)). The Commission has established the interstate, domestic, interexchange services market, taken as a whole, as the relevant product market to assess market power. Id. at 16. The Commission has also determined that there is but a "single national relevant geographic market (including Alaska, Hawaii, Puerto Rico, [the] U.S. Virgin Islands, and other U.S. offshore points.") Id. (emphasis added). These relevant market definitions have been applied to classify not only AT&T, but all interexchange

Commission assesses "market power" based upon an examination of:

(a) the carrier's market share;

(b) the supply elasticity of the market;

(c) the demand elasticity of the carrier's customers (or in BOC's case, potential customers); and

(d) the carrier's cost structure, size, and resources.[24]

Applying these factors to any new entrant BOC--whether or not it sets up a separate affiliate, the Commission can quickly determine that it has no market power and is, by definition, "non-dominant." No justification for applying a different definition of "dominant" to BOCs exists. Because they do not have market power in the interexchange market, BOCs qualify as non-dominant carriers in the subject market. The Commission acknowledges that the available facts suggest this conclusion. The BOCs out-of-region interexchange services should be regulated as non-dominant without structural separation.

E. THE COMMISSION SHOULD AVOID SHACKLING AN IMPORTANT SOURCE OF COMPETITION

The BOCs present the first entry of real competition to the interstate, interexchange business. The actual practice of SBC is instructive. Where permitted to do so--in the wireless interexchange arena--SBC's wireless affiliate has entered the market with prices well below those charged by the existing AT&T/MCI/Sprint oligopoly. When permitted to enter the market with full, non-dominant carrier freedoms, the Commission may expect SBC and the other BOCs to be fierce price and product competitors. This type of competition has been absent from

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providers to date, as non-dominant carriers. Id. at 16.

[24] Id. at 23.

the interexchange business for far too long, and the Commission should avoid implementing rules that could serve in any manner to impede this competition.

III. CONCLUSION

The Commission's tentative conclusions are in opposition to the Telecommunications Act's deregulatory purpose in that the Commission has proposed to regulate the BOCs' out-of-region services as dominant unless provided by a separate affiliate. These conclusions fail to promote any important policy objective. Further, the Commission's tentative conclusions fail to meet the Commission's existing rules and could serve to impede the introduction of competition. The Commission should follow the mandate of the Telecommunications Act and decline to regulate BOCs as dominant in the provision of out-of-region, interstate, interexchange service.

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